

BRIAN H GETZ, ESQ. (CSBN 85593)
LAW OFFICES OF BRIAN H GETZ
201 California Street, Suite 450
San Francisco, CA 94111
Telephone: (415) 912-5886
Facsimile: (415) 438-2655
Email: bhgetz@pacbell.net

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
IAN FURMINGER,
Defendant.

CASE NO. CR-14-102 CRB

**SENTENCING MEMORANDUM OF
DEFENDANT IAN FURMINGER**

DATE: FEBRUARY 23, 2015
TIME: 10:00 A.M.
CTRM: 6

Defendant Ian Furminger appears for sentencing after his conviction on two counts of wire fraud, one count of conspiracy against civil rights, and one count of conspiracy to commit theft concerning a federally funded program. Mr. Furminger submits this Sentencing Memorandum in advance of the hearing on February 23, 2015, with letters of support attached hereto as Exhibits A and B. Mr. Furminger respectfully submits that a sentence below the Guidelines range is sufficient, but not greater than necessary, to comply with the statutory directives set forth in 18 U.S.C. §3553(a).

RELEVANT FACTS REGARDING THE DEFENDANT¹

Mr. Furminger was born in San Francisco and reared in the Bay Area. His parents are elderly and suffer from a variety of ailments which make them dependent on Mr. Furminger for care and assistance. PSR ¶¶60, 106. Mr. Furminger helps to care for them, brings them food and helps his father to walk and stand.

Mr. Furminger was a police officer with the SFPD from 1995 until his resignation in 2014, a period of almost twenty years. PSR ¶80. Prior to this time, he was in the Field Training Officer Program. *See Letter of Support by Michael J. Favetti (“Favetti Letter”), attached hereto as Exhibit A.* He was an exceptional and distinguished officer, earning many awards including the following: a Bronze Medal of Valor in 1997 for chasing down a parolee who possessed a firearm; a Life Saving Award in 1999 for resuscitating a person who overdosed on heroin; the Bay Area Officer of the Year award in 2000 (he received 90% of the votes)²; the Gold Medal of Valor in 2000 for valor during a shootout on October 6, 1998; the Police Commission Commendation in 2000 for catching a prostitute murderer (Jack Bockin) and a night club rapist (Kenneth Phelon); the 10851 Master Award in 2000 for recovering a large number of stolen cars; the Meritorious Conduct Award in 2002 for organizing efforts to locate suppliers of GHB and MDMA in clubs; and the Unit Citation in 2007 for catching the Golden Gate Park rapist by himself. *Id.* Throughout his police career, Mr. Furminger also earned over 100 Police Captain Commendations. *See Martin Letter, Exh. B, at page 2.* In fact, Mr. Furminger earned each and every award available except the Silver Medal of Valor, including the highest honor, the Gold Medal of Valor. PSR ¶80.

Mr. Furminger is described by those who know him best as loyal, honest and trustworthy, a man to whom one would entrust one's own life and those of one's family. *See* Favetti Letter, Exh. A, page 2. He is described as a truly outstanding person and one who, on more than one occasion, was willing to lay down his life for the safety, protection and welfare

¹ The facts in this section are taken from the Presentence Report (“PSR”) and the attached supporting letters.

² See Letter of Support by Kevin Michael Martin (“Martin Letter”), attached hereto as Exhibit B.

1 of others. Martin Letter, Exh. B., page 3. Mr. Furminger's soon-to-be ex-wife is supportive
 2 despite their differences, expressing disbelief that he could have committed these crimes, which
 3 she describes as "so shocking and out of character." PSR ¶66. She also describes Mr. Furminger
 4 as a great father, and commented to the probation officer that being a cop was the most
 5 important thing to him besides being a father. *Id.* Mr. Furminger's daughter was "shocked"
 6 when she heard of the instant offenses, and remains supportive of him. PSR ¶63. His daughter's
 7 mother, from whom Mr. Furminger separated in 2002, describes the defendant as always having
 8 good intentions, and requests leniency from the Court because she feels that Mr. Furminger
 9 truly loves his kids and family. PSR ¶64.

10 Mr. Furminger is a person who looks out for others, and is compassionate and
 11 empathetic. Martin Letter, Exh. B, page 1. Mr. Furminger is very involved in community
 12 service, coaching youth sports, and volunteering for school functions, book drives, as a physical
 13 education teacher at his children's schools, and at fundraisers for crime prevention. PSR ¶63.
 14 He has volunteered frequently at the University of California Hospital Children's Cancer Ward,
 15 delivered turkeys to St. Anthony's, and given his time to many other charitable activities.
 16 Martin Letter, Exh. B, page 1. Mr. Furminger is a good family man and a good father to his
 17 children, especially his young son who looks up to him and will need his father during his
 18 developmental years. PSR ¶¶63-66; Favetti Letter, Exh. A, page 2.

THE APPLICABLE GUIDELINE SENTENCE

20 The Court requested, and the parties submitted, separate briefing on the applicable
 21 guidelines calculation, which the Court will determine at the hearing on February 18.

A VARIANCE IS APPROPRIATE IN THIS CASE

23 The PSR states that the probation officer has not identified any factors that would
 24 warrant a departure from the applicable sentencing guidelines range. PSR ¶104. However,
 25 the PSR did identify a number of factors that may warrant a sentence outside of the advisory
 26 guidelines system. PSR ¶¶105-109. Mr. Furminger respectfully submits that a variance is
 27 appropriate and necessary, and that consideration of the §3553(a) factors counsels a sentence
 28 far below the guidelines range in this case.

1 In *United States v. Booker*, 125 S. Ct. 738, 757 (2005), the Supreme Court abandoned
 2 the rigidity of the guidelines, making the guidelines advisory only and authorizing judges to
 3 consider the full range of relevant considerations in imposing a fair and reasonable sentence.
 4 The Sentencing Reform Act, as revised by *Booker*, permits the court to tailor the sentence in
 5 light of other statutory concerns, such as the factors listed in 18 U.S.C. §3553(a). The
 6 primary directive in Section 3553(a) is for sentencing courts to “impose a sentence sufficient,
 7 but not greater than necessary, to comply with the purposes set forth in paragraph 2.” Under
 8 18 U.S.C. §3661, “*no limitation* shall be placed on the information concerning the
 9 background, character, and conduct of [the defendant] which a court of the United States may
 10 receive and consider for the purpose of imposing an appropriate sentence” (emphasis added).

11 There are factors present in this case which, taken together, form the basis for a variance
 12 from the applicable guidelines range. Mr. Furminger is 48 years old, and has had no prior
 13 criminal history. Although the lack of a criminal history is a factor that has already been
 14 considered by the Guidelines, it is a factor to be taken into consideration in determining the
 15 “combination of factors” that lead to a departure from the guidelines. *United States v. Fairless*,
 16 975 F.2d 664, 668-69 (9th Cir. 1992). Mr. Furminger has a long history of public and
 17 community service, which supports a variance under U.S.S.G. §§5K2.08(a)(4) and 5H1.11.
 18 Where a defendant has a blameless record, his or her outstanding generosity should be able to
 19 be taken into account. *United States v. Takai*, 941 F.2d 738, 744 (9th Cir. Cal. 1991).

20 “[T]he district court must make a refined assessment of the many facts bearing on the
 21 outcome.” *Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035, 2046, 135 L. Ed. 2d 392, 413
 22 (1996). Mr. Furminger’s conduct in connection with the offenses of conviction represents
 23 aberrant behavior, a factor which the Court may consider in imposing a sentence below the
 24 Guideline range. *United States v. Takai*, 941 F.2d at 742-44 (aberrant behavior is a mitigating
 25 circumstance of a kind or to a degree that the Sentencing Commission did not adequately take
 26 into account when formulating the Guidelines); see also U.S.S.G. Ch.1, Pt. A, Intro. (4)(d);
 27 *United States v. Martinez-Villegas*, 993 F.Supp. 766, 778 (C.D.Cal. 1998).

1 Mr. Furminger worked hard to provide for his family, and led a law-abiding until well
 2 into his forties. He excelled as a police officer and was passionate about his career, as evidenced
 3 by his receiving two medals of valor and numerous other commendations. PSR ¶107. He saved
 4 lives and risked his own life to save others and to arrest criminals. *Id.* and Recommendation,
 5 page 2. He is described as compassionate, trustworthy and loyal. The conduct underlying his
 6 conviction was clearly aberrant.

7 The Ninth Circuit has held that there is an “aberrant behavior spectrum” in determining
 8 when a departure for aberrant behavior should apply. *Takai*, 941 F.2d at 743. Courts may
 9 consider a “convergence of factors” and should take into account the “totality of circumstances”
 10 when considering where a defendant’s behavior falls along the spectrum and whether to grant a
 11 downward departure. *United States v. Fairless*, 975 F.2d at 667-68. Factors have included: (1)
 12 the singular nature of the criminal act, (2) spontaneity and lack of planning, (3) the defendant’s
 13 criminal record, (4) psychological disorders the defendant was suffering from, (5) extreme
 14 pressures under which the defendant was operating, including the pressure of losing his job, (6)
 15 letters from friends and family expressing shock at the defendant’s behavior, and (7) the
 16 defendant’s motivations for committing the crime. *Id.* at 668; *Takai*, 941 F.2d at 743-44.

17 In *Takai*, a downward departure was granted for aberrant behavior by “two persons who
 18 by happenstance had seen a sudden opportunity to acquire green cards illegally.” *Takai* at 744.
 19 Here, too, it appears that Mr. Furminger became involved in a scheme not of his making which
 20 presented an opportunity which Mr. Furminger failed to decline. The supporting letters express
 21 shock that he would ever have become involved in criminal conduct, and attest that such
 22 conduct is not in keeping with his character and will not be repeated. The PSR notes that these
 23 sentiments are echoed by his family, including the mothers of his two children. PSR ¶¶63-66.
 24 Further, as noted in the PSR, Mr. Furminger was suffering from anxiety and other impairments,
 25 in addition to the extreme pressures inherent in his line of work and depression resulting from a
 26 shooting in 1998. PSR ¶¶ 64,72-73, 75, 106.

27 For these reasons, the Court is urged to impose a sentence considerably below the
 28 recommended guideline range. Such a sentence is authorized under U.S.S.G. §5C1.1(c)(3) and

1 would be sufficient, but not greater than necessary, to comply with the statutory directives set
2 forth in 18 U.S.C. §3553(a).

3 **CONCLUSION**

4 Under the circumstances of this case, incarceration below the guideline range would be
5 sufficient, but not greater than necessary to satisfy the goals of the Sentencing Reform Act, as
6 revised by *Booker*. To the extent that the Court requires additional evidence on any issue
7 addressed herein and pertinent to sentencing, Mr. Furminger respectfully requests or reserves
8 the right to request an evidentiary hearing.

9 Respectfully submitted,

10 Dated: February 16, 2015

LAW OFFICES OF BRIAN H GETZ

11
12 /s/
13 BRIAN H GETZ
14 Attorney for Defendant
15 IAN FURMINGER
16
17
18
19
20
21
22
23
24
25
26
27
28